

RICHARD ALVES
PHILIP G. SMITH
RUTH M. SMITH

IBLA 85-17, 85-47

March 29, 1985

Appeal from decisions of the California State Office, Bureau of Land Management, rejecting applications for conveyance of federally owned mineral interest. CA 8314 and CA 8223.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

BLM may properly reject an application for conveyance of a federally owned mineral interest (oil and gas) to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1982), where the applicant has not shown that use of the land for production of avocados is a more beneficial use of the land than mineral development.

APPEARANCES: E. E. Clabaugh, Jr., Esq., for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Richard Alves and Philip G. and Ruth M. Smith appeal decisions of the California State Office, Bureau of Land Management (BLM), dated August 21, 1984, rejecting their applications for conveyance of federally owned mineral interests. The Alves application, CA 8314, was filed on June 2, 1980, and the Smith application, CA 8223, was filed on March 28, 1980. ^{1/} Both applications were filed pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (1982). Appellants are

^{1/} The Alves application, CA 8314, described 40 acres of land as follows: San Bernardino Meridian, California

T. 4 N., R. 22 W. Sec. 12 NE 1/4 NE 1/4

The Smith application, CA 8223, described 12.63 acres of land as follows: Bernardino Meridian, California

San

T. 4 W., R. 2 W. Sec. 7, Lot 2

the owners of the surface estate of the lands described in their respective applications. Both tracts of land originally were conveyed by the United States by means of the same patent (number 1126267) issued on June 15, 1949, which reserved "to the United States all the oil and gas in the lands so patented" together with the right to prospect for, mine, and remove such deposits. Appellants' respective statements of reasons refer each to the other and to the same patent. Therefore, we have consolidated the appeals for decisions.

Appellants seek to use the surface of the respective tracts for the production of avocados. In their statements of reasons for appeal, appellants contend that because of the topography of the land, the reservation of mineral rights in the United States interferes with, precludes, and will destroy nonmineral development of the land; and they submitted exhibits in support of this contention. Exhibit N to the Alves statement of reasons is a report regarding salinity near a roadway which runs across the Alves tract which was used by Argo Petroleum Corporation (Argo) while conducting drilling operations adjacent to the land. The report concludes that soil salinity in the samples taken is well above the level considered desirable for the growing of avocados. The report found soil salinity elsewhere on the tract to be within the tolerance limit for such fruit. Exhibit O, also submitted by Alves, shows that as to a "sample of oily mud water * * * taken from road which goes through orchard," the total dissolved solid content and the chloride content is sufficiently high to cause serious damage to avocado trees.

However, other exhibits submitted by appellant, Alves, evidence willingness on the part of Government agencies and Argo to minimize future damage and compensate for past damages to the Alves tract. Exhibit I to the Alves statement of reasons is a letter from the District Ranger, United States Forest Service (Forest Service), dated August 21, 1980, to counsel for appellants which states that:

Mr. Alves is concerned about Argo Petroleum Corporation's proposal to obtain access across his property to an exploratory oil well drilling site. This site is located on National Forest land, north of and adjacent to Mr. Alves' property.

The Forest Service has no responsibility for Argo's needs for access across private property south of the proposed drill site. This issue is one for Argo and the private land owners to resolve.

I would like to take this opportunity to describe the circumstances that resulted in the proposed drill site being located on National Forest land. The original site proposed by Argo was located on Mr. Alves' property about 300 feet southwest of the current location on National Forest land. The original location is site #4 which is one of six sites described by Ventura County in the draft EIR for CUP 3688. After Argo submitted their application to the county, Mr. Alves constructed a dwelling and other improvements on site #4. Argo subsequently proposed to move the site either immediately to the east, remaining on Mr. Alves' land, or to the northeast onto National Forest land.

The Forest Service recommended to U.S.G.S. that they issue the permit to drill on National Forest land. This was done after consulting with Argo and with the Ventura County Division. It was agreed that construction of the site on National Forest land would result in less impact on the environment than would occur if the well were drilled on Mr. Alves' property.

On March 20, 1980 the Ventura County Planning Commission resolved to recommend approval of sites #2-#6 to the Board of Supervisors. Approval of Site #4 was contingent upon the requirement that it be located on National Forest land. The drill site was moved to the National Forest because it would result in less environmental impact and not to avoid the requirement of a conditional use permit and mitigating conditions.

On March 31, 1980 the U.S. Supreme Court heard the case of Ventura County vs. Gulf Oil. [2/] The Supreme Court upheld the decision of lower courts that Gulf Oil does not have to comply with state or local zoning laws when exploring for oil and gas on Federal lands.

As a result of this decision Argo withdrew their application to the County for sites four thru six which are located on National Forest land. On May 27, 1980 the county Board of Supervisors approved the remaining locations, sites two and three.

I would also like to point out that the approved drilling operation is temporary in nature and is expected to last about 35 days. Only exploration activities for the purpose of discovering and disclosing the extent of mineral deposits is allowed. If a discovery is made and Argo proposes development and production they must submit an operating plan. At this time the Forest Service and U.S.G.S. must prepare a specific environmental accessment [sic] for the proposal before production or development is authorized.

Exhibit P attached to the Alves statement of reasons is a letter dated September 22, 1981, from an arbitrator who had agreed to act as a mediator between Alves and Argo regarding damages resulting from Argo's operations near the property. The letter lists the arbitrator's opinion regarding 11 demands made by Alves and two additional points raised by the arbitrator. The arbitrator found that Alves should be compensated for security costs during the drilling period; that Alves should be recompensed for laboratory tests to evaluate potential for damages; and that Alves should be compensated for the cost of washing trees. The total compensation amount was found to be \$1,806. The arbitrator directed Argo to do remedial work on the road surface; remove mud spilled in the orchard; and fill and compact the sanitation pit. The

2/ 601 F.2d 1080 (9th Cir. 1979), aff'd, 445 U.S. 947 (1980). In that decision, at pages 1083-84, the Supreme Court notes extensive regulations governing oil and gas leasing as to both subsurface and surface operations.

arbitrator considered other measures sought by Alves unnecessary, since Argo was not pursuing oil and gas operations at the time of arbitration. However, the arbitrator noted that nothing in the findings was binding on either Argo or Alves in any future negotiations. There is nothing which would indicate whether there has been a final resolution of this dispute.

Appellants also contend that prior unsuccessful exploration for oil and gas has proven that oil and gas is not present in the land beneath their respective parcels and, as a result, their intended use of the land is more beneficial than any speculative mineral exploration. Appellants seek to use the surface of the subject tracts for the production of avocados.

[1] Section 209(b)(1) of FLPMA, 43 U.S.C. § 1719(b)(1) (1982), provides that the Secretary may convey a federally owned mineral interest, where the surface is in non-Federal ownership, only

if he finds (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development.
[Emphasis added.]

Absent a finding that one of the specified conditions exists, an application for conveyance must be rejected. Denman Investment Corp., 78 IBLA 311 (1984).

In its August 1984 decisions BLM rejected appellants' applications for conveyance of the reserved mineral interest. Both decisions refer to the mineral report prepared by the Minerals Management Service. This report states:

[The applications describe lands which] are located between producing oil wells and also abandoned test wells. There is insufficient data from either the parcels or from adjacent areas for making conclusive determinations as to the respective oil and gas values. However, the parcels do have sufficient potential for high oil and gas values that we recommend additional information be acquired, as provided under Sec. 209 of FLPMA.

Unfortunately, the geology of the area is of such complexity that only by drilling can the oil and gas values of the parcels be reasonably established. Drilling costs in the area are relatively high. Test well costs exceeding one million dollars are not unusual.

Both decisions state that, effective February 14, 1983, the tracts are within the undefined Ojai Field, a known geologic structure (KGS).

As to rejection of application CA 8314, BLM notes that applicant had furnished data supporting his claim of interference with and preclusion of appropriate nonmineral development. The data furnished related to claims for damages to the Alves property purportedly caused by Argo, the lessee of oil and gas lease R 4575, a lease terminated by operation of law effective

October 31, 1982. In both decisions appealed from, BLM noted that each applicant had stated that it would be difficult to find financial loans for improvement or development and that the surface estate will suffer a diminution of value if the oil and gas interest is not owned by the surface owner. 3/

We note that, at the very least, lands which are within a KGS are considered to be "presumptively productive" of oil or gas. While inclusion of land in a KGS does not mean that the land itself is currently producing or has been determined to be productive of oil or gas, land may be included in a KGS because of geological indicia that a producing oil or gas deposit extends under the land such that the land is considered to be "presumptively productive." 43 CFR 3100.0-5(1); Jerry A. Schuster, 83 IBLA 326 (1984). Appellants do not contend that the KGS determination was in error, and have not presented sufficient evidence that the land has no "known mineral values," as that term is defined in 43 CFR 2720.0-5(b). Therefore, they have not satisfied the first condition for a section 209(b) conveyance. See Robert Gattis, 73 IBLA 92 (1983); John G. Hafernicks, 69 IBLA 118 (1982).

Clearly, appellants have shown that the reservation of mineral rights has resulted in some interference with the nonmineral development as contemplated by section 209(b) and the regulations. Evidence provided by appellants shows that both the Forest Service and Argo made efforts to mitigate damage to Alves' property and support the findings of the arbitrator that damage had been incurred. However, this evidence also shows an ability to develop the mineral interest without substantial or long-term damage to the crops of appellants. If, as in the past case, future mineral development is conducted in a manner which results in damage to appellants' trees, appellants will have the right to seek compensation. However, we find that appellants have not submitted evidence which would substantiate their claim that their development for avocado growing is more beneficial than a properly conducted oil and gas extraction operation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge

3/ As to application CA 8223, the decision notes that appellant had included a rejection of a real estate loan application citing two reasons for rejection: "1. Inadequate collateral [and] 2. Subject property would be declined because oil and gas rights are excepted from the ownership and the property is in an area of active drilling and exploration."

